

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JAMES W. FORSYTHE, et al.,

Plaintiff,

vs.

JOSEPH BROWN, et al.,

Defendant(s).

AND RELATED CLAIMS

) 3:10-CV-0716-RCJ (VPC)  
 ) consolidated with  
 ) 3:10-CV-0804-RCJ (VPC)

**REPORT AND RECOMMENDATION  
 OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B), 636(e)(6)(iii), and the Local Rules of Practice IB 1-4. Before the court are two matters, both of which concern ongoing discovery disputes in this action. Defendants Joseph Brown, Cognate 3, LLC, Suzannah Robert, and Perfect Balance, Inc., and counterclaimant/third-party plaintiff Cognate 3, LLC (“Cognate parties”) filed a motion for sanctions pursuant to Rule 37(b) for plaintiffs’ failure to obey this court’s order of July 27, 2011 (#93). Plaintiffs opposed (#101) and the Cognate parties replied (#105).

Also before the court is the contempt proceeding against Deane Albright (“Mr. Albright”), the certified public accountant whom plaintiffs retained as their expert witness to testify about plaintiffs’ damages. The Cognate parties filed a motion for order to show cause why Mr. Albright should not be held in contempt of court for failure to obey subpoenas (#94). Plaintiffs opposed (#101), the Cognate parties replied (#105), and the court granted the Cognate parties’ motion (#110). The court issued an order to show cause and set a hearing for December 6, 2011 (#112). Mr. Albright, through plaintiffs’ counsel, filed a notice of lodgement (#102) and a memorandum in response to the order to show cause

(#119). D. Greg Durbin, counsel for the Cognate parties (“Mr. Durbin”), filed an affidavit in support of the order to show cause (#121), and the court held an evidentiary show cause hearing on December 6, 2011 (#124). The court granted Mr. Durbin leave to file a supplemental brief concerning the issue of proper service of subpoenas (#123). The court now enters this order.

## **I. Introduction**

These two consolidated cases center around a study conducted in Reno, Nevada on adult stage IV cancer patients testing the efficacy of an experimental drug called Salicinium.<sup>1</sup> The plaintiffs in the Case No. 3:10-CV-0804-RCJ (VPC) action (the “804 case”), filed their complaint on September 28, 2010, in the United States District Court for the Central District of California. The plaintiffs are James W. Forsythe, M.D., an individual, Century Wellness Clinic, and James W. Forsythe, M.D., H.M.D. a Nevada Professional Corporation. In the 804 case, plaintiffs allege claims for federal trademark infringement, federal trademark fraud, federal false designation of origin, federal trademark dilution, and five state law claims. Plaintiffs seek damages for irreparable harm and injury, lost profits, loss of goodwill, and other damages in excess of thirty million dollars (804 case #1). Plaintiffs sued Joseph Brown, Cognate 3 LLC, Perfect Balance Metabolic Research, and Cancer Hope Center.

On that same date, plaintiff James Forsythe (“plaintiff”) filed a complaint in the Washoe Country District Court against defendants Cognate 3 LLC, Joseph Brown, and Suzannah Roberts, and defendants removed the matter to this court on November 16, 2010 (716 case #1-1). Plaintiff alleges four claims relief: (1) slander, defamation, and libel per se based on allegations by defendants that plaintiff falsified the results of the study; (2) extortion by defendants threatening criminal prosecution and publication of defamatory statements if plaintiffs failed to deliver the study results and relinquish his intellectual property rights to the subject marks; (3) intentional interference with prospective contractual relationships with his patients and others by demanding he discontinue his use of Salicinium; and (4) intentional interference of prospective contractual relationships by demanding plaintiff discontinue the use of Salicinium. *Id.* The plaintiffs and counter-defendants are collectively referred to as the “Forsythe parties.”

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<sup>1</sup>The District Court ordered consolidation of the cases pursuant to the parties’ stipulation (#28).

1 The Cognate parties answered and counterclaimed, raising four claims for relief: (1) breach of  
 2 contract for failing to provide the Salicinium study results; (2) breach of the covenant of good faith and  
 3 fair dealing; (3) unjust enrichment by receiving Salicinium from Cognate free of charge, which is  
 4 allegedly worth millions of dollars; and (4) declaratory relief regarding the ownership of the subject  
 5 marks (#13).

6 Given the complexity of the claims in this case, the court scheduled monthly case management  
 7 conferences with the parties so that discovery disputes could be resolved quickly and efficiently and to  
 8 enable the parties to complete discovery in a timely, cost effective manner. Since the parties'  
 9 unsuccessful early settlement conference in March 2011, the court has held case management  
 10 conferences beginning in June 2011 through November 2011. The court initially set a discovery  
 11 deadline of June 21, 2011 (#29), granted an extension until August 22, 2011 (#47), and then set the  
 12 following final discovery deadlines:

- 13 (1) Fact discovery deadline – November 30, 2011;
- 14 (2) Expert reports due – December 16, 2011;
- 15 (3) Rebuttal expert reports due – January 20, 2012; and
- 16 (4) Expert discovery deposition deadline – February 20, 2012

17 (#83). This order concerns the Cognate parties' efforts to obtain discovery about the Forsythe parties'  
 18 damage claims, as well as documents for Cognate 3 regarding its counterclaims from the Forsythe parties  
 19 and/or from their accountant, Mr. Albright.

## 19 **II. Procedural History**

### 20 **A. Request for Production of Documents to Forsythe parties**

21 On February 7, 2011, the Cognate parties sent a request for production of documents to the  
 22 Forsythe parties, and Request Nos. 68 and 69 asked for all documents in support of plaintiffs' claims of  
 23 lost profits and loss of goodwill or other damages (#67, Exs. F & G). The Forsythe parties responded  
 24 in their original and supplemental responses that their accountant, Mr. Albright, was in possession of  
 25 the documents, and he would submit an expert report (#67, Ex. J & Ex. L). Earlene Forsythe, Dr.  
 26 Forsythe's wife, confirmed that Mr. Albright had been the Forsythes' accountant for at least twenty years  
 27 (#67, Ex. O). After several attempts to meet and confer, the Cognate parties filed a motion to compel  
 28

1 production of these and other discovery responses in June 2011, three months after the responses were  
2 due.

3 On July 27, 2011, the court granted the Cognate parties' motion to compel and ordered the  
4 Forsythe parties to produce responsive documents no later than Wednesday [sic],<sup>2</sup> September 26, 2011,  
5 two months from the date of the hearing and six months after the initial responses were due (#83). The  
6 Forsythe parties did not comply with the court's order, and the Cognate parties' counsel, Mr. Durbin  
7 sent the Forsythe parties' counsel, Marie Mirch ("Ms. Mirch") an email to request compliance with the  
8 court's order (#93, Ex. C). As of October 6, 2011, Ms. Mirch provided nothing, and this motion for  
9 sanctions followed.

10 The Forsythe parties' opposition to the motion for sanctions, filed October 13, 2011, is telling:

11 [Dr. Forsythe] does not have the documents relating to damages, as the  
12 financial information for both of his business (and person) are in the  
13 custody and control of his CPPA, [sic] Deane Albright. In responding to  
14 these requests, Dr. Forsythe properly identified that he did not have the  
15 document [sic] and directed defendants here to get them. However, in  
16 doing so, Dr. Forsythe referred to the financial statements, tax returns and  
17 Schedule C's for his business. He did not waive the account-client [sic]  
18 privilege that exists under Nevada Revised Statutes.

19 (#101, p. 2).

20 **B. The Three Subpoenas Duces Tecum to Mr. Albright**

21 **1. June 17 Subpoena for Tax Returns,  
22 Financial Statements, and Communications**

23 The Cognate parties' failed in their February 2011 attempt to obtain financial documents from  
24 the Forsythe parties through standard requests for production of documents, because they insisted that  
25 Mr. Albright had all of the financial information; therefore, the Cognate parties served a subpoena on  
26 Mr. Albright and his firm on April 27, 2011 (#64, Ex. A). The subpoena sought the following categories  
27 of documents through the period 2004-2010:

- 28 1. Financial statements for Dr. Forsythe, Century Wellness Clinic,  
or Cancer Treatment Center;
2. Tax returns for these parties;
3. Documents between Mr. Albright's firm and HST Global, Inc,  
concerning the above-named parties;

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<sup>2</sup>The court minutes incorrectly reflect September 26, 2011 as a Wednesday; in fact, it was a Monday (#83).

4. Documents between Mr. Albright's firm and Ron Howell, Eric Clemons, or Wes Tate concerning the above-named parties; and
5. Any documents between Mr. Albright's firm and the parties identified in category #1.

*Id.* The term "documents" was defined in pertinent part "to include, but not limited to, reports, correspondence, notes, diaries, logs, directives and work papers, emails, videos, brochures, books, articles, [and] marketing materials, . . ." *Id.* This initial definition of "documents" played an important role in the disputes, which are the subject of this order.

Mr. Albright received the subpoena at the end of April 2011, and he emailed his clients, James and Earlene Forsythe, with a copy to Marie and Kevin Mirch, to ask how to respond (#64, Ex. A & #124, Ex. B).<sup>3</sup> Of course, by this time the Forsythe parties and Ms. Mirch were well aware that the documents sought through the subpoena were the same documents they had been asked to produce months earlier in February. Upon service of this subpoena, Danette Hessler ("Ms. Hessler"), an accountant employed by Mr. Albright's firm, initiated the following email exchange among Mr. Albright, Earlene Forsythe ("Ms. Forsythe"), plaintiff's wife, with copies to Ms. Mirch and Mr. Mirch:

May 17, 2011 - Ms. Hessler to Mr. Albright:  
[Mr. Albright], I have attached a copy of the subpoena we received regarding Dr. Forsythe. Please review and let me know what documents we are actually providing. Especially, if I need to get the 2010 tax returns completed by the deadline of 5/26/11.

May 18, 2011 - Mr. Albright to Ms. Forsythe:  
This is what I received. Any urgency?

May 18, 2011 - Earlene Forsythe to Mr. Albright:  
No we do not need the 2010 tax returns by that date. No urgency.

May 18, 2011 - Mr. Albright to Ms. Forsythe (copies to Marie Mirch and Kevin Mirch):  
Need to ask Marie [Mirch] and Kevin [Mirch]. *I don't think it would be good for you to give any financials. "Banner year" in 2010; I could give them a copy of extension for 1040.*

May 19, 2011 - Dr. Forsythe to Mr. Albright: (Copy to Ms. Mirch):  
We are not going to court, case was settled, Forsythe vs. Wright. For now you are right Deane. *We should not be giving out any financials for 2010.*

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<sup>3</sup>Ms. Mirch is plaintiffs' counsel in this proceeding; however Ms. Mirch advised at the show cause hearing that she was specially appearing on behalf of Mr. Albright. See Transcript of December 6, 2011 order to show cause hearing at ("OSC hearing Tr.") at 7:16-19. Pursuant to Fed.R.Evid. 201, the court takes judicial notice that Kevin Mirch was disbarred from the practice of law in Nevada on April 10, 2008.

1 We will do the extension if needed in the Brown case. Thanks Deane for  
2 being on top of it.

3 May 19, 2011 - Mr. Albright to Dr. Forsythe (copy to Ms. Mirch):  
4 Good job!! Justice was obviously served. Deane

5 (OSC Hearing, Ex. 3) (emphasis supplied). Mr. Albright later testified that by characterizing 2010 as a  
6 “banner year,” he meant that Century Wellness Center had enjoyed a great year financially and had made  
7 higher profits that ever before. OSC hearing Tr. at 103:3-11.

8 Mr. Albright did not object to the April subpoena; instead, Ms. Mirch moved to quash the  
9 subpoena on the ground that she had not received formal notice pursuant to Fed.R.Civ.P. 45(b)(1), (#64,  
10 Ex. A; Affidavit of Ms. Mirch). The Cognate parties re-served the subpoena and provided proper notice  
11 of the subpoena on June 17, 2011, which is why the first subpoena is referred to as the “June 17  
12 subpoena” in this order (#70, Ex. A & B). Plaintiffs’ motion to quash the original subpoena was deemed  
13 to apply to the June 17 subpoena.<sup>4</sup>

14 At the July 14, 2011 case management hearing (#80), this court denied plaintiffs’ motion to  
15 quash and ordered as follows:

16 a. Financial statements 2004 - 2010 for James Forsythe, MD,  
17 Century Wellness Clinic, or Cancer Screening & Treatment  
18 Center of Nevada shall be produced.

19 b. Tax returns from 2004 - 2010 for James Forsythe, MD, Century  
20 Wellness Clinic, or Cancer Screening & Treatment Center of  
21 Nevada shall be produced.

22 With respect to the financial statements and tax returns, the Court  
23 clarifies that the subpoena does not seek information of Dr.  
24 Forsythe or his wife in their personal capacities. The subpoenas  
25 seek information under Dr. Forsythe’s dba as a sole  
26 proprietorship.

27 c. Mr. Albright shall produce any documents in his possession  
28 concerning HST Global, Inc. between 2004 - 2010 pertaining to  
James Forsythe, MD, Century Wellness Clinic, or Cancer  
Screening & Treatment Center of Nevada. If Mr. Albright does  
not have these documents or they are no longer in his possession,  
he shall so state in his response to this request.

d. As to documents between Mr. Albright and Ron Howell, Eric  
Clemons or Wes Tate pertaining to James Forsythe, MD, Century

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<sup>4</sup>Upon receipt of the June 17 subpoena, Mr. Albright emailed the Forsythes and told them, “I am forwarding this to Kevin [Mirch] and Marie [Mirch] to see how I should respond (#124, Ex. B).

Wellness Clinic, or Cancer Screening & Treatment Center of Nevada, Ms. Mirch advises these documents do not exist; therefore, Mr. Albright shall so state in his response to this request.

- e. Documents between Mr. Albright and James Forsythe, MD, Century Wellness Clinic, or Cancer Screening & Treatment Center or Nevada for 2004 - 2010 shall be produced.

The court ordered that the documents be produced by July 22, 2011. *Id.* On this same date, Ms. Mirch emailed Mr. Albright and directed him to comply with the June 17 subpoena by July 22, 2011 (#124, Ex. C). Mr. Albright received Ms. Mirch's email and understood the direction to produce the documents by July 22, 2011. OSC hearing Tr. at 65:1-25; 66:1-4. Mr. Albright knew that he was ordered to produce emails from his firm to Mr. Howell and/or HST Global, Dr. Forsythe, Century Wellness or Century Screening Centers – all for the period 2004 - 2010. OSC hearing Tr. at 66:5-25; 67:1-8. However, Ms. Forsythe instructed Mr. Albright not to respond to the order because the items were confidential and privileged; therefore, he did not do so. OSC hearing Tr. at 68:16-25; 69:1-9.<sup>5</sup>

In response to the court's order, Mr. Albright and his firm produced 172 pages of documents through plaintiffs' counsel; however, on July 28, 2011, Mr. Durbin, counsel for the Cognate parties ("Mr. Durbin") wrote Mr. Albright a detailed letter – with a copy to plaintiffs' counsel – to explain the deficiencies in the production and to request compliance (#124, Ex. E). Mr. Albright had failed to produce certain tax returns, financial statements, and documents ordered by the court, and he only produced two emails between Mr. Albright and HST. *Id.* Mr. Albright never responded to the letter. OSC hearing Tr. at 72:4-17.

## **2. August 2, 2011 Subpoena for Working Papers and Files**

The August 2, 2011, subpoena was a second attempt to obtain the documents not produced in response to the June 17 subpoena, specifically, working papers and all documents deemed communications between Mr. Albright and his clients, Dr. Forsythe and Century Wellness Clinic (#124, Ex. G). Mr. Albright understood the scope of the August 2 subpoena, but did not object to the subpoena on or before the return date. OSC hearing Tr. at 77:2-21.

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<sup>5</sup>On July 20, 2011, Mr. Albright sent another email to both Kevin and Marie Mirch: "Kevin and Marie: This is everything requested in the subpoena. Please let me know if you need anything else." (#124, Ex. D).



1 At the September 12, 2011, case management conference (#88), the court considered Mr.  
2 Albright's failure to respond to the July 28, 2011, letter and the August 2 subpoena and stated:

3 The Court notes Ms. Mirch does not represent Mr. Albright. The Court  
4 further notes Mr. Durbin represents in defendants' case management  
5 report that there are deficiencies with Mr. Albright's production as it  
6 concerns the first subpoena and that Mr. Albright has failed to respond to  
7 the second subpoena. The Court expresses its concern regarding the  
8 importance for Mr. Albright to respond to these subpoenas so the parties  
9 can complete their discovery. If Mr. Albright does not respond to the  
10 subpoenas, Mr. Durbin will be left to file a motion to compel and request  
11 sanctions. The Court advised Mr. Durbin he shall have leave to send Mr.  
12 Albright a copy of this order.

13 On September 13, 2011, Mr. Durbin sent Mr. Albright a letter advising that he had failed to fully  
14 comply with the June 17 subpoena, and that he totally failed to comply with the August 2 subpoena  
15 (OSC hearing, Ex. H). Mr. Durbin set a deadline for compliance for both subpoenas for Friday,  
16 September 16, 2011, and he warned Mr. Albright that failure to comply would draw a motion for  
17 contempt of court for failure to obey the subpoenas. *Id.* He also warned Mr. Albright that he would seek  
18 attorney's fees and costs in obtaining compliance of the subpoenas. *Id.* On September 14, 2011, Mr.  
19 Durbin sent a follow-up letter to Mr. Albright and enclosed a copy of this court's September 12, 2011  
20 minute order (OSC hearing, Ex. I).

21 Mr. Albright did not comply with the subpoenas, and he did not respond to the letters. Although  
22 Mr. Albright he received the September 13 and 14, 2011, letters and the court's minute order, he did  
23 nothing in response at Ms. Forsythe's direction and because "everything would go through Marie  
24 Mirch." OSC hearing Tr. at 78:3-13. Mr. Albright conceded that there was nothing in the court's  
25 September 12, 2011, order to indicate that the pendency of a motion to quash excused Mr. Albright from  
26 responding to the subpoenas, and that other than conversations with Ms. Mirch or Ms. Forsythe that a  
27 motion to quash was forthcoming, he had no other information, apart the court's order. OSC hearing  
28 Tr. at 80:9-25;81:1-24. Mr. Albright admitted that the court's order stated that if he failed to respond  
to the subpoenas, a motion would follow with a request for sanctions. OSC hearing Tr. at 82:8-19. Mr.  
Albright did not comply with the court's order because Ms. Mirch told him that Ms. Forsythe was  
adamant that he not do so. OSC hearing Tr. at 80:8-25; 81:1-25; 82:1-25; 83:1-4.



1                   **3.       September 20, 2011 Subpoena**

2           In a final effort to avoid contempt proceedings, the Cognate defendants served a third subpoena  
3 on the custodian of records for Mr. Albright's firm, which included the items covered in the June 17 and  
4 August 2 subpoenas with a return date of September 30, 2011 ("September 20 subpoena") (OSC hearing,  
5 Ex. J). Mr. Albright did not produce documents responsive to the subpoena, and he made no appearance  
6 at the time, date, and location set out in the subpoena. OSC hearing Tr. at 77:10-21.

7                   **4.       September 29, 2011 Motion to Quash**

8           On September 29, 2011, plaintiffs filed a motion to quash the September 20 subpoena and  
9 supplement concerning the earlier June 17 and August 2 subpoenas (#s 90 & 91). Plaintiffs asserted the  
10 accountant-client privilege as a basis for Mr. Albright's refusal to comply. *Id.* On October 12, 2011,  
11 Mr. Albright also asserted the accountant-client privilege in response to the August 2 subpoena and  
12 attested that he had already produced all documents responsive to the June 17 subpoena. (#102). The  
13 Cognate defendants responded to plaintiffs' motion to quash and also filed their motion to hold Mr.  
14 Albright and his firm in contempt of court (#s 92 & 94.)

15                   **5.       October 18, 2011 Hearing**

16           The court denied plaintiffs' motion and supplemental motion to quash subpoenas (#s 90 & 91)  
17 and ordered that categories of documents responsive to the June 17 and September 20 subpoenas be  
18 produced, and that all documents responsive to the August 2 subpoena be made available for copying  
19 by October 20, 2011 (#110). The court ordered Dr. Forsythe to produce Schedule C to his personal tax  
20 return to the extent it relates to his sole proprietorship. *Id.* The court also granted the Cognate parties'  
21 request for monetary sanctions against the Forsythe parties because it found the motion quash was  
22 brought without justification and for the purpose of delay. *Id.*

23           The court granted the Cognate defendants' motion for order to show cause why Mr. Albright  
24 should not be held in contempt court and set the matter for hearing on December 6, 2011. *Id.* As of  
25 October 6, 2011, the date the Cognate defendants filed their motion for contempt, this was the status of  
26 the document production:

*a. The June 17 and September 20 Subpoenas*

1. Financial statements and tax returns 2004 - 2010 for Dr. Forsythe, Century Wellness Clinic, or Cancer Screening & Treatment Center of Nevada – Plaintiffs’ initial production on July 21, supplemented September 21, and finally supplemented on October 3. Production completed.
2. Documents between Mr. Albright’s firm and HST Global, Inc. for 2004-2010 pertaining to the above-named parties: two emails.
3. Documents between Mr. Albright’s firm and Ron Howell, Eric Clemens or Wes Tate regarding the above-named parties: None.
4. Documents for 2004 - 2010 between Mr. Albright’s firm and the above-named parties: None.

(#94, Affidavit of Mr. Durbin). Therefore, as to categories 1, 2, and 3, Mr Albright completely failed to respond to the June 17 and September 20 subpoenas, this court’s July 14, 2011 order (#80), as well as the Cognate parties’ informal efforts to obtain the documents through their July 28, September 13, and September 14 letters. *Id.*

*b. The August 2 and September 20 Subpoenas*

These two subpoenas sought working papers in support of tax returns and financial statements for the years 2004 - 2010 for Century Wellness Clinic, James W. Forsythe, and James W. Forsythe, a sole proprietorship, as well as documents or electronic communications between Mr. Albright’s firm and these parties. *Id.* Other than the financial statements and tax returns earlier produced, Mr. Albright produced nothing more. *Id.*

**6. Mr. Albright’s November 9, 2011 Deposition**

*a. Emails*

Counsel for the Cognate defendants took Mr. Albright’s deposition on November 9, 2011 (#121, Durbin affidavit). Mr. Albright testified that he did not get “real serious” about searching his Outlook email system at his firm until after September 30, 2011 (#121, Ex. B (partial excerpt of Albright deposition)). As of the date of his deposition, Mr. Albright had produced sixteen emails between his firm & HST/Mr. Howell, as well as three internal emails between his firm and the Forsythes relating to HST (#121).

1 As of the date of Mr. Albright's deposition, he had produced no emails concerning  
2 communications between him and his firm and plaintiffs (other than a few relating to HST and the  
3 subpoenas), even though the subpoenas called for production of all emails. At his deposition, Mr.  
4 Albright agreed to do a new search and put on a CD the email traffic between Mr. Albright's firm and  
5 the Forsythes or their businesses (#121, Ex. B). On November 15, 2011, Mr. Albright produced what  
6 he described as "relevant Forsythe emails" (#121, Ex. A). After discussions between Mr. Albright and  
7 defendants' counsel about the scope and meaning of "relevant Forsythe emails," Mr. Albright produced  
8 eighty-eight additional pages of emails based upon an expanded definition of what is "relevant" (#121).  
9 However, this latest response was limited to emails Mr. Albright sent, received, or deleted in his  
10 mailbox, and it does not account for the email traffic between his firm and the plaintiffs for the period  
11 2004 through 2010. OSC hearing Tr. at 90:21-25; 91:1-21; 92:16-25; 93:1-25; 94:22-25; 95:1-7. Mr.  
12 Albright testified that Ms. Hessler has been the accountant mainly responsible for the financials and tax  
13 returns for the plaintiffs for the past twelve years and is the person who has maintained significant  
14 contact with the Forsythes, yet no email traffic between Ms. Hessler and the plaintiffs had been  
15 produced. OSC hearing Tr. at 95:10-25; 96:1-2; 98:11-19.

16 *b. Mr. Albright's Engagement Letter with Plaintiffs*

17 Although the very first subpoena served on Mr. Albright asked for production of documents,  
18 including any correspondence, it was not until Mr. Albright's deposition that he testified concerning the  
19 indemnity provision in his firm's engagement letter with the plaintiffs. Mr. Albright testified that his  
20 engagement letters include a provision that in the event a client directs him not to disclose information  
21 in response to subpoenas or summonses, the client will indemnify him for attorney's fees and costs  
22 (#124, Ex.1). At the show cause hearing, Mr. Albright first testified that he did not produce the  
23 engagement letter at Ms. Forsythe's direction. OSC hearing Tr. at 69:7-11. He then explained that he  
24 did not consider an engagement letter "correspondence," despite the fact that it is on his firm's  
25 letterhead, was addressed to the plaintiffs, and he mailed it to his clients. He thought of engagement  
26 letters as work paper files. OSC Hearing Tr. at 69:12-25; 70:1-25.

1 **III. Fed.R.Civ.P. 37(b) and Fed.R.Civ.P. 45**

2 **A. Fed.R.Civ.P. 37(b)**

3 Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure provides for sanctions for a party's  
4 failure to comply with a discovery order, and sanctions may include the following:

- 5 (i) directing that the matters embraced in the order or other  
6 designated facts be taken as established for the purpose of the  
7 action, as the prevailing party claims;
- 8 (ii) prohibiting the disobedient party from supporting or opposing  
9 designated claims or defenses, or from introducing designated  
10 matters into evidence;
- 11 (iii) striking pleadings in whole or in part;
- 12 (iv) staying further proceedings until the order is obeyed;
- 13 (v) dismissing the action or proceeding in whole or in part;
- 14 (vi) rendering a default judgment against the disobedient party; or
- 15 (vii) treating as contempt of court the failure to obey any order except  
16 an order to submit to a physical or mental examination.

17 The court is not limited to imposing the sanctions enumerated Rule 37(b)(2)(A) and may make any order  
18 that is "just." *Valley Engineers, Inc. v. Electric Engineering Co.*, 158 F.3d 1051, 1056 (9<sup>th</sup> Cir. 1998)  
19 (justice is the central factor in a sanctions order under Rule 37(b)). Instead of or in addition to the  
20 potential sanctions listed above, "the court must order the disobedient party, the attorney advising that  
21 party, or both to pay the reasonable expenses, including attorney's fees, cause by the failure [to obey the  
22 court's order], unless the failure was substantially justified or other circumstances make an award of  
23 expenses unjust." Fed.R.Civ.P. 37(b)(2)(C). In deciding whether to grant sanctions, the court may  
24 "properly consider all of a party's discovery misconduct . . ., including conduct which has been the  
25 subject of earlier sanctions." *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9<sup>th</sup> Cir. 1997).

26 The Cognate parties request the following sanctions: (1) a finding that the plaintiffs suffered no  
27 damages or irreparable injury in this action; (2) an order that the Forsythe plaintiffs are precluded from  
28 presenting any evidence of loss of goodwill, loss of profits, other damages, or irreparable injury at the  
trial in this case; (3) a finding that the Forsythe plaintiffs entered into an agreement or understanding  
with HST Global to provide the results of the Salicinium study to HST Global and, in turn, were used  
by HST Global in filings with the Securities and Exchange Commission; and (4) an award of attorney's  
fees and costs to the Cognate parties for bringing the motion for sanctions (#93).

Although the requested sanctions would not result in dismissal of the Forsythe parties' action, they come close to it. The Ninth Circuit adopted a five-part test, with three subparts to the fifth part, to decide whether a case-terminating sanction is proper:

- 1) the public's interest in expeditious resolution of litigation;
- 2) the court's need to manage its docket;
- 3) the risk of prejudice to the party seeking sanctions;
- 4) the public policy favoring disposition of cases on their merits; and
- 5) the availability of less drastic sanctions.

The subparts of the fifth factor are whether the court has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of case-dispositive sanctions.

*Connecticut General Life Insurance v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007) (citing *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003) (citations omitted)). The test is not mechanical, but provides the court with a way to consider what to do, and it is "not a set of conditions precedent for sanctions or a script that the district court must follow." *Connecticut General*, 482 F.3d at 1096 (citing *Valley Eng'rs v. Electrical Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998)). In deciding whether to impose case-terminating sanctions, the most critical factors are not simply delay or docketing management concerns, but truth and whether "a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts." *Id.* at 1097 (citing *Valley Eng'rs. v. Electric Eng'g. Co.*, 158 F.3d 1051, 1057-58 (9th Cir. 1998)). Where sanctions result in default or dismissal, "the sanctioned party's violations must be due to the 'willfulness, bad faith, or fault' of the party." *Jorgensen v. Cassidy*, 320 F.3d at 912 (quoting *Hyde & Drath v. Baker*, 24 F.3d 1162, 1167 (9th Cir. 1994)).

#### **B. Fed.R.Civ.P. 45**

Rule 45 of the Federal Rules of Civil Procedure governs subpoenas duces tecum for the production of documents with or without the taking of a deposition and allows parties to a lawsuit to compel a non-party to produce documents. Once a nonparty is served with a subpoena, the obligation to respond cannot be delegated to an attorney, especially where the subpoenaed party has control over the documents requested in the subpoena. *Corrales v. Castillo*, 2008 WL 4186233, 1 (D. Nev. 2008). If the non-party objects to the subpoena, he or she can object, and once this occurs, the subpoena recipient is not obligated to comply with the subpoena. Fed.R.Civ.P. 45(c)(2)(B)(i) & (ii). The

1 objection must be served within fourteen days after service of the subpoena, or before the time  
2 designated in the subpoena, if sooner. Failure to serve timely objections may constitute a waiver of  
3 objections to the subpoena, other than objections to service. *McCoy v. Southwest Airlines Co., Inc.*, 211  
4 F.R.D. 381, 385 (C.D. Cal. 2002) (citing *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2<sup>nd</sup> Cir. 1998).  
5 If the parties are unable to resolve their dispute, the serving party may file a motion to compel. In  
6 contrast, a party cannot object to a subpoena duces tecum served on a nonparty, but must instead file a  
7 motion to quash or seek a protective order. Fed.R.Civ. P. 45(c)(3). *See Moon v. SCP Pool Corp.*, 232  
8 F.R.D. 633, 636 (C.D. Cal. 2005).

9 Rules 45(d)(2)(A) requires a person withholding subpoenaed information under a claim of  
10 privilege to expressly make the claim and to provide a privilege log. However, there is no federal  
11 accountant-client privilege. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) citing  
12 *Couch v. United States*, 409 U.S. 322, 335 (1973). *See also In re Grand Jury Proceedings Witness*  
13 *Bardier*, 486 F.Supp. 1203, 1211 (D. Nev. 1980).

14 Rule 45(e) provides that a court may “hold in contempt a person who, having been served, fails  
15 without adequate excuse to obey the subpoena.” The initial question regarding contempt “has long been  
16 whether [contemnors] have performed ‘all reasonable steps within their power to insure compliance’  
17 with the court’s orders.” *Stone v. City of San Francisco*, 968 F.2d 850, 856 (9<sup>th</sup> Cir. 1992), cert. denied,  
18 506 U.S. 1081 (1993) (quoting *Sekaquaptewa v. McDonald*, 544 F.2d 396, 404 (9<sup>th</sup> Cir. 1976), cert.  
19 denied, 430 U.S. 931 (1977)). The party moving for contempt has the burden to establish by clear and  
20 convincing evidence that the contemnor has violated a clear and specific court order. *Bademyan v.*  
21 *Receivable Management Services Corp.*, 2009 WL 605789 (C.D. Cal. 2009). *See also Woolfard*  
22 *Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9<sup>th</sup> Cir. 1997).

23 Once the moving party shows by clear and convincing evidence that the contemnor has violated  
24 a clear and specific court order, the burden shifts to the contemnor to show that he or she took every  
25 reasonable step to comply and to explain why compliance was not possible. *Bademyan*, 2009 WL at  
26 605789, 2. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9<sup>th</sup> Cir. 1983). To assess the extent to which  
27 the contemnor has taken “every reasonable step” to comply with the court order, the court can consider  
28

1 “(1) a history of noncompliance and (2) failure to comply despite the pendency of a contempt motion.”  
2 *Bademyan*, 2009 WL at 605789, 2 (citations omitted).

### 3 **III. Discussion and Analysis**

4 The court considers the Cognate parties’ motion for sanctions and the contempt proceeding  
5 together because the facts reveal how clearly one is tied to the other. Mr. Albright did not make  
6 decisions about whether to comply with the subpoenas or court orders in a vacuum; he did so after  
7 consulting with Ms. Mirch and the Forsythe parties. The Forsythe parties and Ms. Mirch, in turn,  
8 responded to discovery requests knowing that the Cognate parties were attempting to obtain the same  
9 financial documents from Mr. Albright that they had earlier refused to produce because Mr. Albright was  
10 the custodian of those records. The evidence reveals a shell game by which the Forsythe parties and their  
11 counsel – with the cooperation of Mr. Albright – did their best to delay discovery and keep the Cognate  
12 parties in the dark about critical information related to the plaintiffs’ damage claims. It is in this context  
13 that the court now turns to each matter.

#### 14 **A. Mr. Albright’s Contempt of Court**

##### 15 **1. The Cognate defendants have established by clear and convincing 16 evidence that Mr. Albright violated orders of this court and the subpoenas.**

17 The court has outlined in detail the chronology of events in this case, and the court finds that the  
18 Cognate parties have met their burden to establish clear and convincing evidence that Mr. Albright  
19 ignored the requirements of three subpoenas and this court’s order.

##### 20 **2. Whether Mr. Albright took reasonable steps to comply with the subpoenas 21 and this court’s order.**

22 The court now considers whether Mr. Albright demonstrates that he took every reasonable step  
23 to comply with the subpoenas or that compliance was not possible. *Stone*, 968 F.2d at 856. In making  
24 this determination, the court considers Mr. Albright’s history of noncompliance and the extent to which  
25 he failed to comply during the pendency of the motion for contempt. *Bademyan*, 2009 WL at 605789,  
26 2.

27 Mr. Albright testified there were four general reasons why he failed to comply with three  
28 subpoenas and the court’s order: (1) he thought disputes concerning the scope of the subpoenas stayed



1 production;<sup>6</sup> (2) he thought he had given the Cognate parties all of the documents responsive to the  
 2 subpoenas;<sup>7</sup> (3) his staff made errors in collecting documents responsive to the subpoenas;<sup>8</sup> and (4) his  
 3 clients told him not to do so. The fourth reason cuts to the heart of what occurred in this case. Mr.  
 4 Albright followed his clients' orders and Ms. Mirch's advice, perhaps under the mistaken belief that the  
 5 indemnification provision of his firm's engagement letter would shield him from liability for failing and  
 6 refusing to comply with subpoenas and a court order.

7 *a. The Accountant-Client Privilege*

8 Mr. Albright testified repeatedly at the show cause hearing that he ignored the three subpoenas,  
 9 Mr. Durbin, and this court's order at his clients' directions because the Forsythes felt many of the  
 10 requests invaded the accountant-client privilege. OSC hearing Tr. at 9:23-25; 10:1-1; 38:9-21; 39:1-9;  
 11 40:1-5; 41:10-20; 46:14-20; 68:1-25; 69:1-9; 72:13-17; 75:23-25; 76:1-2; 78:8-13; 80:15-21; 81:3-11;  
 12 82:16-25; 83:1; 106:5-9. In fact, the groundwork for noncompliance was set in mid-May, when Mr.  
 13 Albright and his clients had an email exchange *not* to produce 2010 financial information because  
 14 Century Wellness Center had enjoyed a "banner year" (OSC hearing Ex. 3). From the outset, Ms.  
 15 Forsythe and/or Ms. Mirch made the decisions about what Mr. Albright should or should not produce.  
 16 Mr. Albright acquiesced and never once objected to three subpoenas served on his firm over a five-  
 17 month period. As the recipient of the subpoenas, it was Mr. Albright's obligation to send Mr. Durbin  
 18 a letter – either himself or through *his* attorney – to interpose objections to the subpoenas. Had Mr.  
 19 Albright retained his own attorney, he might well have been advised that the accountant-client privilege  
 20 does not apply in federal court, as all of the documents sought by the three subpoenas related to the  
 21 damages that plaintiffs claim under the Lanham Act, as well as to their request for injunctive relief based  
 22 upon irreparable harm (#1).

23  
 24  


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 25 <sup>6</sup>OSC hearing Tr. at 41:10-25; 42:1-4; 44:12-18; 46:2-20; 48:15-17; 64:21-25; 77:22-25; 78:1-13;  
 80:15-25; 81:1-24; 82:1-24.

26 <sup>7</sup>OSC hearing Tr. at 30:3-12; 33:17-25; 34:1-11; 34:13-24; 39:17-25; 47:23-25; 48:1; 53:5-7;  
 27 54:12-16; 59:2-10; 61:10-15.

28 <sup>8</sup>OSC hearing Tr. at 13:1-9; 14:19-25; 20:1-9; 14:11-24; 19:7-25; 75:3-19; 97:13-25; 98:1-25;  
 99:1-10.

1                                    *b.        Mr. Albright did not reasonably comply with the subpoenas.*

2            Mr. Albright failed to demonstrate he took reasonable steps to comply with the subpoenas; in  
3 fact, his conduct suggests a concerted and deliberate effort to derail discovery to prevent the Cognate  
4 defendants from obtaining documents to which they are entitled. Mr. Albright's conduct also reveals  
5 a history of noncompliance – even in the face of a court order and this court's express warning that he  
6 faced contempt if he failed to do as the court ordered. Mr. Durbin went to extraordinary lengths to avoid  
7 a contempt proceeding by serving new subpoenas and writing to Mr. Albright several times to implore  
8 him to respond. Mr. Albright gave Mr. Durbin no choice but to proceed, and as a result, unreasonably  
9 delayed discovery in this case.

10            What is even more disturbing is the even after the court ordered the show cause hearing, Mr.  
11 Albright continued to fail to produce documents that were clearly within the scope of the subpoenas.  
12 The most glaring example is his firm's emails. At his deposition in November, Mr. Albright agreed to  
13 produce emails responsive to the subpoenas and then decided only to produce those he deemed  
14 "relevant." After more disputes, Mr. Albright only produced his personal emails, notwithstanding that  
15 it was Ms. Hessler, not Mr. Albright, who had been the Forsythes' liaison for the firm for twelve years  
16 and would obviously have hundreds of emails on her computer.

17            Mr. Albright cannot shirk his obligations under the subpoenas and the court's order with the  
18 response that he was following his clients' order, or that he did not know the accountant-client privilege  
19 does not apply in federal court. Nor does the indemnity provision of the engagement letter with his  
20 clients shield him from contempt. Mr. Albright had control of the documents and had a clear duty to  
21 produce documents in the possession of his firm. While it is unfortunate that Mr. Albright relied on his  
22 clients' or Ms. Mirch's advice and did not retain his own attorney, it is he, not they, who is subject to  
23 the contempt motion, and he must bear the consequences.

24                                    **B.        Rule 37(b) discovery sanctions**

25            Early in February 2011, the Cognate parties propounded routine discovery requests on the  
26 Forsythe parties about their damage claims, and the Forsythe parties responded in March that their  
27 accountant, Mr. Albright, had all of the documents responsive to the requests (#67-3, Ex. J). When Mr.  
28 Durbin received the responses, he called Ms. Mirch, she agreed to supplement the responses, and Mr.

1 Durbin followed this phone call with a detailed letter, which outlined the deficiencies in the responses  
 2 and his understanding of their agreement (#67). When Ms. Mirch did not reply, he sent follow-up  
 3 emails to her on March 31, April 6, April 8, and April 11, 2001. *Id.* Ms. Mirch finally responded on  
 4 April 12, 2011, promising discovery responses “no later than early next week.” *Id.* Mr. Durbin sent a  
 5 confirming email that the documents would be provided by April 19, 2011. *Id.* On April 22, 2011, Ms.  
 6 Mirch finally provided supplemental responses, but Mr. Durbin deemed them inadequate, and the motion  
 7 to compel followed. *Id.*

8 Mr. Durbin filed his motion to compel on June 14, 2011, four months after sending the initial  
 9 written discovery and at about the same time Ms. Mirch had also moved to quash the first subpoena on  
 10 Mr. Albright for the very same documents that Ms. Mirch had conceded were in Mr. Albright’s  
 11 possession. In response to the motion to compel, filed in early July 2011, the Forsythe parties once again  
 12 simply report that Mr. Albright had all of the documents, but added that they had filed a motion to quash  
 13 the subpoena because it had not been properly served (#73). On July 27, 2011, this court granted the  
 14 Cognate parties’ motion to compel and set a deadline of September 26, 2011, to supplement all of the  
 15 outstanding discovery (#83). The court expressly stated at that hearing that the Cognate parties were  
 16 entitled to these documents from both the Forsythe parties and Mr. Albright. As Mr. Durbin noted, “The  
 17 need for Plaintiffs to be explicit and specific about their damage claims is particularly crucial in this case  
 18 since Plaintiffs were so vague about their damages in their initial disclosures” (#93, p. 5:4-6).<sup>9</sup> No  
 19

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20  
 21 <sup>9</sup> Pursuant to the Federal Rules of Civil Procedure 26(a)(1)(C), Plaintiff/Counter-  
 22 Defendant, and Third Party Defendant provide the following with respect to the categories of damages  
 23 claimed herein, and without waiving, prejudicing or in any way limiting the matters to be covered by any  
 24 experts timely designated by the Plaintiff/Counter-Defendant, and Third Party Defendant and the subject  
 25 and content of the reports by any such experts.

- 26 1. Damage to Dr. Forsythe’s reputation - damages do not have to be proven for  
 27 defamation per se.
- 28 2. Lost profits - the amount to be determined by Plaintiffs’ CPA Deane Albright. Mr.  
 Albright has not yet prepared an expert report detailing these damages.
3. Emotional distress - exact amount not yet determined.
4. Cost of litigation.
5. Attorneys’ fees - exact amount to be determined at conclusion of case.
6. Non-monetary damages including inductive and declaratory relief and other such relief  
 as deemed by the court.

1 supplement had been provided to the initial disclosures as of the filing of the motion for sanctions (#93,  
2 p. 5:8).

3 On September 26, 2011, the Forsythe parties provided supplements to some discovery, but  
4 provided no supplemental responses to Request Nos. 68 and 69, which pertain to their damage claims  
5 (#93). This information was critical to the Cognate parties, in light of the November 30, 2011 discovery  
6 cutoff and the December 16, 2011 discovery cutoff for experts. *Id.*

7 On September 27, 2011, Mr. Durbin once again sent an email to Ms. Mirch to ask that she  
8 supplement the documents as ordered by the court, but she did not respond. Mr. Durbin had no choice  
9 but to file the motion for sanctions on October 6, 2011. *Id.*

10 At the October 18, 2011 hearing, the court denied Ms. Mirch's latest motion and supplemental  
11 motion to quash, ordered an outside vendor to pick up the documents from Mr. Albright's office October  
12 20, 2011, for copying, ordered Dr. Forsythe to produce certain portions of his personal tax return,  
13 granted the motion to hold Mr. Albright in contempt, set a date for that hearing, ordered scanning of  
14 patient files, and awarded the Cognate parties their attorney's fees concerning briefing on the motion to  
15 quash (#110). The court awarded monetary sanctions against the Forsythe parties because the motion  
16 to quash was unjustified and delayed discovery. *Id.* The court decided to await the outcome of the  
17 contempt hearing before ruling on the motion for sanctions. *Id.*

18 As the court has discussed, the record in this case amply supports sanctions. Because the  
19 sanctions requested are severe, although not case-ending, the court considers the five-part test most  
20 recently outlined in *Connecticut General*, 482 F.3d 1091, 1096 (9<sup>th</sup> Cir. 2007).

21 **1. The public's interest in expeditious resolution of litigation**

22 The documents the Cognate parties sought from the Forsythe parties and Mr. Albright are  
23 essential to an analysis of the damage claims, which the plaintiffs claim exceed thirty million dollars.  
24 Nearly one year ago, the Cognate parties first attempted to obtain these documents with limited success,  
25 notwithstanding court orders. It is also worth noting that time and time again, Mr. Durbin attempted to  
26 resolve these discovery disputes without resorting to the court. He repeatedly sent Ms. Mirch letters and  
27 emails, and he followed up with telephone calls. It was to no avail. It is clear that Ms. Mirch and the  
28

1 Forsythe parties intended to delay and obstruct production of these documents as long as possible. This  
2 factor weighs in favor of sanctions.

3 **2. The court's need to manage its docket**

4 Severe sanctions are warranted when “a [party’s] noncompliance has caused the action to come  
5 to a halt, thereby allowing the [party], rather than the court, to control the pace of the docket.” *Allen v.*  
6 *Bayer Corp. (In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.)*, 460 F.3d 1217, 1234 (9<sup>th</sup> Cir.2006)  
7 (citations omitted). The Forsythe parties filed an early motion for summary judgment in April 2011, and  
8 Ms. Mirch consistently urged the court to stay discovery until the District Court decided that motion.  
9 When this court denied her request, the Forsythe parties’ began a campaign to resist standard discovery  
10 and oversaw Mr. Albright’s decision to ignore repeated subpoenas for necessary records. As a result,  
11 the Forsythe parties clogged the court’s docket and slowed discovery, despite the court’s admonitions  
12 that discovery deadlines would not be extended yet again. This factor weighs in favor of sanctions.

13 **3. The risk of prejudice to the party seeking sanctions**

14 “Failing to produce documents as ordered is considered sufficient prejudice.” *Allen*, 460 F.3d  
15 at 1227 (citations omitted). Prejudice is presumed from an unreasonable delay, and the burden to show  
16 actual prejudice shifts to the party seeking the sanction only after the responding party has given a non-  
17 frivolous excuse for the delay. *Hernandez v. City of El Monte*, 138 F.3d 393, 400-1 (9<sup>th</sup> Cir. 1998).  
18 Ms. Mirch and the Forsythe parties engaged in a months-long strategy to prevent production of  
19 documents to the Cognate parties. Since February 2011, the Cognate parties tried in vain to get the  
20 Forsythe parties to provide evidence to support their claims of loss of goodwill, lost profits, other  
21 damages, and irreparable injury. Despite being ordered by the court to do so on July 27, 2011, the  
22 Forsythe parties continued to stall. As a result, the Cognate parties have been effectively prevented from  
23 preparing their defense of the damage claims. Ms. Mirch and the Forsythe parties have given no  
24 plausible, non-frivolous excuse for these delays. Ms. Mirch and the Forsythe parties acted willfully and  
25 in bad faith, especially when their actions are considered along with their directions to Mr. Albright to  
26 ignore three subpoenas for the same documents. This factor weighs in favor of sanctions.

1                   **4. The public policy favoring disposition of cases on their merits**

2           Although the Cognate parties have not requested case-terminating sanctions, those requested are  
 3 severe and would prevent the Forsythe parties' from proving up their damages. The sanctions would  
 4 also result in a finding that the Forsythe parties and HST Global had an agreement by which Dr.  
 5 Forsythe, as a member of HST's board of directors, provided information on the results of the Salicinium  
 6 study to HST that were used in HST's filings with the Securities and Exchange Commission. These  
 7 sanctions must be balanced against Ms. Mirch and the Forsythe parties' deliberate pattern of obstruction  
 8 of discovery to prevent the Cognate parties from obtaining evidence on these critical issues. This factor  
 9 weights slightly in favor of the Forsythe parties.

10                   **5. The availability of less drastic sanctions**

11           Factors that indicate whether a court has considered alternatives include: "(1) Did the court  
 12 explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would  
 13 be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance  
 14 before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before  
 15 actually ordering dismissal?" *Allen*, 460 F.3d at 1228-9, quoting *Malone v. U.S. Postal Service*, 833  
 16 F.2d 128, 132 (9<sup>th</sup> Cir. 1987). These factors provide a way for the court to think about what to do as  
 17 opposed to a formula the court must follow. *Conn. Gen. Life, Ins. Co.*, 482 F.3d at 1096.

18           Over many months, the court issued orders, admonitions, and sanctions against Ms. Mirch, the  
 19 Forsythe parties, and Mr. Albright - all to no avail. However, the court reiterates that it is not  
 20 considering case-terminating sanctions in this case. Perhaps a more relevant question is whether the  
 21 conduct of the Forsythe parties and Ms. Mirch make it unlikely that the truth will ever come out.<sup>10</sup> Here,  
 22 Ms. Mirch and the Forsythe parties engaged in a concerted pattern of bad faith and discovery abuse  
 23 designed to thwart every legitimate attempt the Cognate parties made to secure basic discovery about

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24  
 25           <sup>10</sup> Another example of the court's lack of confidence that the truth will ever come out in this case  
 26 concerns an assertion Ms. Mirch made for the first time at the December order to show cause hearing.  
 27 Ms. Mirch told the court that there were no certificates of service "for the two subpoenas in the summer  
 28 prior to September." OSC Tr. At 151:20-23; 152:1-10. The court granted Mr. Durbin leave to file a  
 supplemental reply to contradict Ms. Mirch's statements. He did so, and the court finds that Ms. Mirch  
 waived any claim that she did not receive timely notice of the subpoenas because she never made an  
 objection on that basis, nor did she raise it as a ground for the original opposition (#123). Moreover,  
 the statement is simply not true.

1 a pivotal issue in this case. Ms. Mirch and the Forsythe parties consistently failed to respond to  
 2 discovery requests, to Mr. Durbin's repeated efforts to meet and confer, and they disregarded this court's  
 3 order. At case management hearings and motions hearings, the court repeatedly warned Ms. Mirch that  
 4 continued refusal to provide basic discovery would not be tolerated, yet she and the Forsythe parties  
 5 ignored these warnings. In addition to their own misconduct, Mr. Albright took his orders from Ms.  
 6 Mirch and the Forsythe parties and this contributed enormously to the delays in this case and leaves the  
 7 court to wonder whether the Cognate parties will ever have access to the true facts. *Valley Eng'rs.*, 158  
 8 F.3d at 1058. Based upon this record, the court has no confidence that Ms. Mirch and the Forsythe  
 9 parties will ever provide the documents to which the Cognate parties are entitled.

10 The record before the court vividly illustrates Ms. Mirch and the Forsythe parties' bad faith and  
 11 willful disregard of their discovery responsibilities, justifying severe sanctions against them.

### 12 **III. Conclusion and Recommendation**

13 Pursuant to U.S.C. § 636(e)(6)(B)(iii) upon the commission of an act of civil contempt, the  
 14 magistrate judge shall:

15 . . . forthwith certify the fact to a district judge and may serve or cause to  
 16 be served, upon any person whose behavior is brought into question  
 17 under this paragraph, an order requiring such person to appear before a  
 18 district judge to upon a day certain to show cause why that person should  
 19 not be adjudged in contempt by reason or the facts so certified. The  
 district judge shall thereupon hear the evidence as to the act or conduct  
 complained of and, if it is such as to warrant punishment, punish such  
 person in the same manner and to the same extent as for a contempt  
 committed before a district judge.

20 The undersigned magistrate judge finds Deane Albright to be in civil contempt and hereby  
 21 certifies that Mr. Albright has violated the June 17, August 2, and September 20 subpoenas, and this  
 22 court's October 18, 2011 order (#110).

23 The parties should be aware of the following:

24 1. They may file, pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules  
 25 of Practice, specific written objections to this Report and Recommendation within fourteen (14) days  
 26 of receipt. These objections should be titled "Objections to Magistrate Judge's Report and  
 27 Recommendation" and should be accompanied by points and authorities for consideration by the District  
 28 Court.



2. This Report and Recommendation is not an appealable order, and any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

A. Based upon the foregoing and for good cause appearing, IT IS RECOMMENDED that the District Court enter an order regarding Deane Albright as follows:

1. Finding Deane Albright in civil contempt of this court for violating the June 17, August 2, and September 20 subpoenas, and this court's October 18, 2011 order (#110);
2. Ordering Mr. Albright to pay the Cognate parties' reasonable expenses, including attorney's fees and costs, in making the motion to hold Mr. Albright in contempt (#94), the reply (#105), and preparing for and participating in the December 6, 2011 order to show cause hearing;
3. Ordering the Cognate parties to file an affidavit of attorney's fees and costs pursuant to Local Rule 54-16(b) and (c) within ten days from the District Court's order on this report and recommendation; and
4. Ordering Mr. Albright to pay the costs and attorney's fees himself, notwithstanding the indemnification provision of the engagement letter between Mr. Albright and the Forsythes and/or entities controlled by them.

B. Based upon the foregoing and for good cause appearing, IT IS FURTHER RECOMMENDED that the District Court grant the Cognate parties' motion for sanctions (#93) and that it enter the following findings and orders:

1. A finding that plaintiffs, James Forsythe, an individual, Century Wellness Clinic, and James W. Forsythe, M.D., H.M.D. a Nevada professional corporation ("plaintiffs") suffered no damages or irreparable injury in this action;
2. An order that plaintiffs are precluded from presenting any evidence of loss of goodwill, loss of profits, other damages, or irreparable injury at the trial of this case;
3. A finding that plaintiffs entered into an agreement or understanding with HST Global, Inc. to provide the results of the Salicinium study to HST Global and

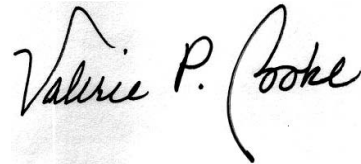
1 HST, in turn, used the findings in its filings with the Securities and Exchange  
2 Commission; and

- 3 4. An order that the Cognate parties are awarded their reasonable attorney's fees and  
4 costs in bringing this motion and all briefing associated with it. Within ten days  
5 of the District Court's order on this report and recommendation, the Cognate  
6 parties shall file an affidavit of attorney's fees and costs pursuant to Local Rule  
7 54-16(b) and (c). Ms. Mirch shall pay one-half of the attorney's fees and costs  
8 awarded, and the Forsythe parties shall pay the other half.

9 C. Based upon the foregoing and for good cause appearing, IT IS FURTHER  
10 RECOMMENDED that the District Court enter an order that Ms. Mirch pay the attorney's fees and costs  
11 the Cognate parties incurred in filing their supplemental reply re order to show cause re contempt (#123).  
12 Within ten days of the District Court's order on this report and recommendation, the Cognate parties  
13 shall file and affidavit of attorney's fees and costs pursuant to Local Rule 54-16(b) and (c).

14 **IT IS SO ORDERED.**

15 DATED: February 6, 2012.

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UNITED STATES MAGISTRATE JUDGE